International constitutional law

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What is the UN Charter?
For what purposes should we try to answer what the UN Charter is?
Overview

• Michael W. Doyle, “The UN Charter – A Global Constitution?”
• Bardo Fassbender, “Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order”
• Q 1: What are the arguments for seeing the UN as a constitutional order?
• Q 2: What are the arguments against seeing the UN as a constitutional order?
Two different arguments from different academic disciplines

• Doyle:
  – The dilemmas of UN’s supranational qualities
    • Legal analysis of the UN charter, ICJ judgments compared with analysis of state practice

• Fassbender:
  – The constitutional functions of the UN charter
    • Legal analysis of the UN Charter, other international legal sources as well as analysis of the legal science’s analyses of the UN Charter
Doyle: The UN Charter – A global Constitution?

- Not similar to the US constitution – does not intend to create a world state
- The UN charter reflects a disaggregated and decentralized international legal order
  - Not all international law is subject to the United Nations
  - The UN Charter is not the legal source of all international law
- Not a standard treaty
  - Supremacy, article 103
  - No provision for resignation
  - Binds all states in matters of peace and security, member and non-members, article 39
  - Hard to amend, article 109
  - Supranational qualities
Supranational qualities and sovereign pushbacks

- Budgets, article 17, 18 (ICJ Expenses case) – taxes? But controversies over Soviets payment in the 1960’s
- Chapter VII, but increased opposition to allocate forces under the direct command of the Council
- Secretary General’s role, article 99 (non-neutrality), but also dependent on neutrality
- Peace keeping operations in transitional regimes – but no guarantee for loyalty on the ground
- The Road Map to implement MDGs – went beyond what the member states had authorized as goals in the Millennium declaration
- Doyle’s conclusion:
  - Supranationality generates sovereign pushbacks.
  - The UN “constitution” still authorizes more than the members are prepared to give
Fassbender: Rediscovering a Forgotten Constitution

Coldplay’s Viva La Vida:
"I used to rule the world"

....

"One minute I held the key/Next the walls were closed on me./And I discovered that my castle stand/Upon pillars of salt, and pillars of sand."

http://www.youtube.com/watch?v=lf8dy_Z_efU
Fassbender: Rediscovering a Forgotten Constitution

• What is an international constitutional order?
  – An order «out there» but one which is not properly discovered?
  – An idea which is to be made real by treaty makers, courts, and legal science?

• What is the UN Charter?
  – A constitution in the clothes of a treaty?
  – A special treaty under international law?
  – Something new?
Fassbender’s argument for reading the UN Charter as a constitution

- Trumann compared the charter to the US constitution
- In the years after 1945, individual statements of few and separated scholars conceptualized the UN Charter as a constitution
  - Verdross and Simma (Kelsen inspired)
  - McDougal and Laswell (New Haven School)
  - Judge Mosler, Toumschat (international community school)
  - Inconsistencies, unspecific etc.
- Fassbenders own argument: Functionalist
Fassbender’s functionalistic approach

• What type of functions do constitutions generally fulfil?
  – Essential functions:
    • Determines the fundamental norms about the
      – organization of governmental functions
      – performance of governmental functions
      – Relationship between the government and those who are governed
    • Provides, for and indefinite period of time, a legal frame and guiding principles for the political life of a community
    • Binding on governmental institutions and the members of community
    • It is the supreme law
  – Liberal democratic functions: protects fundamental rights, judicial review, and accountability /democracy
  – Which functions does the UN Charter fulfil?
Does the UN Charter fulfills essential constitutional functions?

• Does the UN Charter
  – Determine the fundamental norms about the
    • organization of governmental functions in the international community?
    • performance of governmental functions in the international community?
    • Relationship between the government and those who are governed?
  – Provide a legal frame and guiding principles for the political life of the international community?
  – Bind governmental institutions and the members of community
  – Establish a supreme legal order?
State practice and the UN Charter

• Several international treaties recognize the UN Charter
  – Charter of the Organization of American States, article 102
  – The Statute of the Council of Europe, article 1 paragraph c
  – NATO Treaty, article 7

• No states have withdrawn, most states seek membership, no efforts to establish alternatives

• Is this proof that the current international legal order is an order under the United Nations?
Legal Science and the UN Charter

• « something more than a treaty yet less than a world constitution»
• Can legal science imagine anything beyond the sources of international law listed in article 38 of the statutes of the International court of justice? (Treaties, custom, general principles of law)
• Does the UN charter rule the world?
• Is the UN a castle standing upon pillars salt, and pillars of sand?
Q 1: What are the arguments for seeing the UN as a constitutional order?

Q 2: What are the arguments against seeing the UN as a constitutional order?
International constitutionalism: WTO

Introduction
Overview


• Robert Howse, “From Politics to Technocracy – and back again: The Fate of the Multilateral Trading Regime”

• J.H.H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External legitimacy of WTO Dispute Settlement
The multilateral trading system - history

- Bretton Woods 1944:
  - Global economic and financial stability
    - IMF
    - WB
    - Trade?
  - Havanna Charter 1948: The international trade organization (ILO) - (never entered into force)
  - General Agreement on Tariffs and Trade (GATT) 1947
  - A dynamic treaty:
    - Annecy Round: 1949
    - Torquay Round: 1951
    - Geneva Round: 1955–59
    - Dillon Round: 1960–62
    - Kennedy Round: 1962–67
    - Tokyo Round: 1973–79
The World Trade Organization (WTO)

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<th>Umbrella</th>
<th>AGREEMENT ESTABLISHING WTO</th>
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1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** EC prohibition on the placing on the market and the importation of meat and meat products treated with certain hormones.

- **Product at issue:** Meat and meat products treated with hormones for growth purposes.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **SPS Art. 3.1 (international standards):** The Appellate Body rejected the Panel’s interpretation and said that the requirement that SPS measures be “based on” international standards, guidelines or recommendations under Art. 3.1 does not mean that SPS measures must “conform to” such standards.

- **Relationship between SPS Arts. 3.1 / 3.2 and 3.3 (harmonization):** The Appellate Body rejected the Panel’s interpretation that Art. 3.3 is the exception to Arts. 3.1 and 3.2 assimilated together and found that Arts. 3.1, 3.2 and 3.3 apply together, each addressing a separate situation. Accordingly, it reversed the Panel’s finding that the burden of proof for the violation under Art. 3.3, as a provision providing the exception, shifts to the responding party.

- **SPS Art. 5.1 (risk assessment):** While upholding the Panel’s ultimate conclusion that the EC measure violated Art. 5.1 (and thus Art. 3.3) because it was not based on a risk assessment, the Appellate Body reversed the Panel’s interpretation, considering that Art. 5.1 requires that there be a “rational relationship” between the measure at issue and the risk assessment.

- **SPS Art. 5.5 (prohibition on discrimination and disguised restriction on international trade):** The Appellate Body reversed the Panel's finding that the EC measure, through arbitrary or unjustifiable distinctions, resulted in “discrimination or a disguised restriction of international trade” in violation of Art. 5.5, noting: (i) the evidence showed that there were genuine anxieties concerning the safety of the hormones; (ii) the necessity for harmonizing measures was part of the effort to establish a common internal market for beef; and (iii) the Panel's finding was not supported by the “architecture and structure” of the measures.
Overview of disputes
Disputes overview

• By country
  – https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

• Issues:
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Making sense of the WTO?

– Weiler: The Rule of Lawyers and the Ethos of Diplomats
  • WTO practice

– Howse: From Politics to Technocracy – and back again: The Fate of the Multilateral Trading Regime
  • WTO practice and observation of scholarship

  • WTO practice and critique of scholarship
The Rule of Lawyers and the Ethos of Diplomats

Weiler
Background

- Transition from GATT 1947 to GATT 1994
  - GATT 1947: dispute settlement required consent from both parties on reports given by panels individually appointed.
  - Dispute Settlement with compulsory jurisdiction
  - Largest system of international law with compulsory jurisdiction and sanctions
    - Includes states representing almost 5 million people
Relationship between internal and external legitimacy of the AB

- The old regime characterized as diplomacy through other means
  - Internal rationality – self-reference. Deciding international conflicts without reference to a broad international context
  - Discrete approach and individually adjusted case by case decisions
  - Intergovernmental nature of disputes
    - NGOs and private parties not considered relevant
  - The confidential nature of disputes
    - Diplomatic ethos
  - Jurisprudence and Jurists’ prudence
    - The role the Secretariat
Relationship between internal and external legitimacy of the AB

• Transition from GATT 1947 to WTO is characterized as juridification

• But juridification is a “package deal”:
  – Rule of law is only possible through rule of lawyers
  – Contrasts between ethos of lawyers and ethos of diplomats:
    • Disputes are not settled but won or lost
    • Compromises are unattractive in legal disputes
    • Individual ambitions
    • Empowering lawyers and private parties
Dissonance between lawyers and diplomats

- The new system is created on the top of the old (internal legitimacy) and this affects the external legitimacy of the new (internal legitimacy bought at the expense of external legitimacy):
  - An appellate body or the International Court of Economic Justice?
  - The Panel System
  - Secercy
  - NGO’s and amicus brief
  - The role of the secreteriat
  - The practice of the AB
The Politics of International Constitutions: The Curious Case of the World Trade Organization

Dunhoff
Main questions

• Is the WTO a constitutionalized regime?
• Has the WTO-practiced contributed to constitutionalization?
• What is the purpose of studying the WTO as a constitutionalized regime?
From Politics to Technocracy – and back again: The Fate of the Multilateral Trading Regime

Howse
Background

- Discourse of international constitutionalism – presuppose certain claims:
  - globalization, privatization, etc has led to loss of state governance power within territories
  - “lost power” transferred to the international level
  - power exercised on the international level creates normative problems of legitimacy (democratic deficits etc) – certain theories of int. constitutionalism may help to solve the problems (compensatory constitutionalism)

- What about international human rights?
  - Can contribute to loss of state governance power (imposing limits) – but state sovereignty is still the most important limit to more effective international human rights
  - The normative legitimacy of international human rights are not contested?
    - Correct?
Context

• Human rights are protected both by constitutional law and by international treaties

  – Examples?

    China, US, Australia, Europe?
Overview of Gardbaums article

• Main questions:
  – Fundamental rights of individuals are protected by two systems
    • Constitutional law
    • [international] human rights law
  – What is the relationship between these two systems?
    • Differences?
    • Why have both?
Similarities between constitutional and int. human rights protection?

• Function
  – Limits on what government may do to people

• Age
  – Pre-1945 and post-1945?

• Substance
  – Both system protects civil and political rights, but broader protection of social and economic rights in the international human rights system

• Structure
  – Both systems contains some absolute norms, but many merely “presumptive rights”
Differences between constitutional and int. human rights protection?

• Methods of enforcement
  – Constitutional courts with full powers and compulsory jurisdiction
  – Few int. courts with full powers and compulsory jurisdiction
• How to compare other qualities of constitutional and int. human rights protection?
  – Has int. Human Rights system become constitutional law in its own right?
  – Is the int. Human Rights System a Constitutionalized Regime of International Law?
  – Has the int. Human Rights system contributed to the rejection of an international law based purely on sovereignty?
Has int. Human Rights system become constitutional law in its own right?

• What is the defining characteristics of constitutional law?
  – Made by self-consciously constituent powers
  – Highest position in the hierarchy of norms
  – Protected from ordinary methods of amendment or repeal

• Difficult to assess whether international human rights meet these criteria (many systems and sources)

• But hard to claim that all three criteria are met
Is the int. Human Rights System a Constitutionalized Regime of International Law?

• Is the international legal regime protection human rights a horizontal, intergovernmental system, or vertical and supranational system?

  – Have the international human rights treaties transformed into constitutions?

  – The EU as a paradigmatic example (but human rights do not play an important role in the transformation process)

    • Gardbaum does not discuss the role of the Charter of Fundamental rights in the EU after the Lisbon-treaty

  – ECHR

  – American Convention on Human Rights
Human Rights and the Constitutionalization of International Law

• Individuals are becoming subjects

• But international human rights law does not generally bind
  – states against
  – international organizations
Why the two systems?

- Int human rights law is filing gaps (better protection)
- States are having an interest in how a state may treat its population
- External checks
- Increases normative weight of human rights
Conclusion

• Theories of international constitutional law can contribute to the understanding of differences and similarities between domestic and international bill of rights